

# ATTACHMENT A

**POST-TRO REMAND (ULS RATE INCREASE AND EMBEDDED BASE TRANSITION)**  
**AMENDMENT TO**  
**INTERCONNECTION AGREEMENT**  
**BETWEEN**  
**PACIFIC BELL TELEPHONE COMPANY d/b/a SBC CALIFORNIA**  
**AND**  
**MCI WORLDCOM COMMUNICATIONS, INC. (“CLEC”)**

This is a Post-TRO Remand (ULS Rate Increase and Embedded Base Transition) Amendment (the “Amendment”) to the Interconnection Agreement by and between Pacific Bell Telephone Company d/b/a SBC California (“SBC California”) and CLEC (collectively referred to as “the Parties”) (“Agreement”) previously entered into by and between the Parties pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the “Act”).

WHEREAS, the FCC issued its Order on Remand, including related unbundling rules,<sup>1</sup> on February 4, 2005 (“TRO Remand Order”), holding that an incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers (CLECs) for the purpose of serving end-user customers using DSO capacity loops (“mass market unbundled local circuit switching” or “Mass Market ULS”);

NOW, THEREFORE, the Parties wish to amend the Agreement, pursuant to Section 252(a)(1) of the Act and the terms of their Agreement, to be consistent with at least the mass market unbundled local circuit switching findings by the FCC in its TRO Remand Order, and in consideration of the foregoing, and the promises and mutual agreements set forth herein, the Parties agree to amend the Agreement as follows:

1. Notwithstanding anything in the Agreement, pursuant to Rule 51.319(d) as set forth in the TRO Remand Order, effective March 11, 2005, CLEC is not permitted to obtain new Mass Market ULS, either alone or in combination (as in with “UNE-P”). Accordingly, pursuant to Rule 51.319(d)(2)(iii), although SBC shall continue to provide access to Mass Market ULS or Mass Market UNE-P to CLEC for CLEC to serve its embedded base of end-user customers, the price for Mass Market ULS or UNE-P shall be the higher of (A) the rate at which CLEC obtained such Mass Market ULS or UNE-P on June 15, 2004 plus one dollar, or (B) the rate the applicable state commission established(s), if any, between June 16, 2004, and March 11, 2005, for such Mass Market ULS or UNE-P, plus one dollar. For purposes of this Paragraph, “Mass Market” shall mean 1 – 23 lines, inclusive (i.e. less than a DS1 or “Enterprise” level.) CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth penalties for failure to comply with payment terms, notwithstanding anything to the contrary in the Agreement.
2. CLEC will complete the transition of embedded base Mass Market ULS and Mass Market UNE-P to an alternative arrangement by the end of the transition period defined in the TRO Remand Order (i.e. by March 11, 2006).
3. Paragraphs 1 and 2, above, apply and are operative regardless of whether CLEC is requesting Mass Market ULS or Mass Market UNE-P under the Agreement or under a state tariff, if applicable, and regardless of whether the state tariff is referenced in the Agreement or not.
4. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review: *Verizon v. FCC*, et. al, 535 U.S. 467 (2002); *USTA*, et. al v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA I*”) and following remand and appeal, *USTA v. FCC*, 359 F.3d

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<sup>1</sup> Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, (FCC released Feb. 4, 2005).

554 (D.C. Cir. 2004) (“*USTA II*”); the FCC’s 2003 Triennial Review Order and 2005 Triennial Review Remand Order; and the FCC’s Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

5. The Parties acknowledge and agree that this Amendment shall be filed with, and is subject to approval by the Public Utilities Commission of the State of California and shall become effective ten (10) days following the date upon which such state commission approves this amendment under Section 252(e) of the Act or, absent such state commission approval, the date this amendment is deemed approved by operation of law.

IN WITNESS WHEREOF, this Amendment to the Agreement was exchanged in triplicate on this \_\_\_\_\_ day of \_\_\_\_\_, 2005, by the Parties, signing by and through their duly authorized representatives

**MCI WORLDCOM Communications, Inc.**

**Pacific Bell Telephone Company d/b/a SBC California  
by SBC Operations, Inc., its authorized agent**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(Print or Type)

Name: \_\_\_\_\_  
(Print or Type)

Title: \_\_\_\_\_  
(Print or Type)

Title: AVP-Local Interconnection Marketing

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**FACILITIES-BASED OCN #** \_\_\_\_\_

**ACNA** \_\_\_\_\_

# ATTACHMENT B

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion into Competition for  
Local Exchange Service

R.95-04-043

Order Instituting Investigation on the  
Commission's Own Motion into Competition for  
Local Exchange Service

I.95-04-044

**JOINT MOTION BY MCI, INC., THE UTILITY REFORM  
NETWORK, BLUE CASA COMMUNICATIONS, INC. (U-6764-C),  
WHOLESALE AIR-TIME, INC. (U-5751-C), ANEW  
TELECOMMUNICATIONS CORP D/B/A CALL AMERICA (U-6598-  
C), TCAST COMMUNICATIONS (U-5633-C), AND CF  
COMMUNICATIONS, LLC D/B/A TELEKENEX (U-6647-C) FOR  
EMERGENCY ORDER PRESERVING STATUS QUO FOR UNE-P  
ORDERS**

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Inc. and Wholesale Air-Time, Inc.

March 1, 2005

Pursuant to Rule 45 of the Commission's Rules of Practice and Procedure, MCI, Inc., on behalf of its subsidiary MCImetro Access Transmission Services, LLC ("MCImetro") and its other California local exchange subsidiaries that have adopted MCImetro's interconnection agreement with Pacific Bell Telephone Company (collectively "MCI"), Blue Casa Communications, Inc. ("Blue Casa"), Wholesale Air-Time, Inc. ("WAT"), Anew Telecommunications Corp. d/b/a Call America ("Call America"), TCAST Communications ("TCAST"), and CF Communications, LLC d/b/a Telekenex ("Telekenex"), collectively "Joint CLECs," along with The Utility Reform Network ("TURN"), collectively "Joint Movants," file this Motion because Pacific Bell Telephone Company ("Pacific Bell"), by and through its parent company SBC Communications, Inc. ("SBC"), has announced that it intends to breach its interconnection agreements ("Agreements") with Joint Movants, beginning on March 11, 2005. Specifically, SBC has stated that it will on that date begin to reject all orders for new UNE-P lines and stop processing requests for moves, adds, and changes for a competitive local exchange carrier's ("CLEC's") existing customer base pursuant to SBC's interpretation of the legal effect of the FCC's recently issued *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, Order on Remand,, FCC 04-290 (released February 4, 2005) (hereinafter "Triennial Review Remand Order" or "TRRO").

SBC's action would breach Joint CLECs' Agreements in at least two respects: (i) by rejecting UNE-P orders that SBC is obligated by the Agreements to accept and process; and (ii) by refusing to comply with the change of law or intervening law procedures established by the Agreements. Contrary to statements in SBC's Accessible Letters that have been issued to CLECs), including Joint CLECs, the *TRRO* does not excuse or justify SBC's stated

intention of rejecting UNE-P orders beginning on March 11, 2005, and ignoring the change of law process with respect to such UNE-P orders.

Joint CLECs will be unable to place affected types of UNE-P orders in California after March 10, 2005, unless this Commission takes affirmative action to forbid SBC from rejecting such UNE-P orders pending compliance with the change of law provisions in the Agreements. If such action is not taken by the Commission, Joint CLECs will sustain immediate and irreparable injury because they will be unable to fulfill requests for service from existing and new UNE-P customers. California consumers currently benefiting from the local services Joint CLECs offer in California, and consumers who desire to subscribe to services offered by Joint CLECs, also will be injured by SBC's planned illegal actions because they will be deprived of alternative local service offerings.

Joint Movants therefore request that the Commission immediately take action by Assigned Administrative Law Judge or Assigned Commissioner ruling to grant the relief requested in this Motion and then confirm the ruling on an emergency basis at its next scheduled Agenda Meeting on March 17, 2005. Concurrently with the filing of this Motion, Joint Movants have also filed a request for an ordering shortening time for the filing of responses to Friday, March 4, 2005.

### **PARTIES**

1. MCI is a Delaware company with its principal place of business at 22001 Loudoun County Parkway Ashburn, VA 20147. Blue Casa is a Delaware corporation with its principle place of business at 205 East Carillo, Santa Barbara, CA 9301. WAT is a California corporation with its principle place of business at 27515 Enterprise Circle West, Temecula, CA 92590. Anew Telecommunications Corp. d/b/a Call America (U 6598 C) is a

California corporation with its principal place of business at 994 Mill Street, San Luis Obispo, CA 93401. TCAST Communications (U 5633 C) is a California Corporation with its principal place of business at 24300 Town Center Drive, Valencia, CA 91355. CF Communications, LLC d/b/a Telekenex (U 6647 C) is a California limited liability company with its principal place of business at 3221 20th Street, San Francisco, CA 94110-2708. TURN is a California corporation with its principle place of business at 711 Van Ness Avenue, Suite 350, San Francisco, CA 94102. Joint CLECs each have Certificates of Public Convenience and Necessity issued by the Commission that authorize them to provide local exchange service in California. Joint CLECs are “telephone corporations” as defined by Public Utilities Code (PU Code) § 234 and are also each a “telecommunications carrier” and “local exchange carrier” under the Telecommunications Act of 1996 (“Federal Act”). TURN is a statewide nonprofit consumer organization representing residential and small business consumers.

2. Pacific Bell is a California corporation, having offices at 140 New Montgomery, San Francisco, CA 94105 Pacific Bell is a telephone corporation as defined by the PU Code and an incumbent local exchange carrier (“ILEC”), as defined in Section 251(h) of the Federal Act.

### **JURISDICTION**

3. Joint CLECs and Pacific Bell are subject to the jurisdiction of the Commission with respect to the matters raised in this Motion.

4. The Commission has jurisdiction with respect to the matters raised in this Motion under PU Code §§ 216(b) and (c) (subjecting telephone corporations that directly or indirectly perform service for the public or any portion thereof “to the jurisdiction, control,

and regulation of the commission”); under PU Code § 454 (conferring jurisdiction over rates, and related contracts, practices, and rules); under PU Code § 701 (conferring authority to “supervise and regulate every public utility in the State and [to] do all things, whether specifically designated in this part or in additions thereto, which are necessary and convenient in the exercise of such power and jurisdiction”); under PU Code § 709.2 (confirming Commission authority to determine that “all competitors have fair, nondiscriminatory, and mutually open access to exchanges . . . , including fair unbundling of exchange facilities. . . .”); under PU Code § 728 (conferring authority, after hearing, to “determine and fix, by order, . . . just, reasonable, or sufficient rates, classifications, rules, practices, or contracts”); and under PU Code § 729 (conferring authority to investigate “rates, classifications, rules, contracts, and practices”).

5. The Commission also has jurisdiction under the Communications Act of 1934 (the Federal Act”) under 47 U.S.C. § 251(d) (3) (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) with respect to the matters raised in this Motion.

### **FACTS**

6. MCI entered into an interconnection agreement with Pacific Bell, effective as of September 25, 2001, pursuant to D. 01-09-054, which was issued on September 20, 2001 following arbitration in A.01-01-010. The Agreement provides that Pacific Bell shall provision unbundled network elements (“UNEs”) in combinations, including the “UNE Platform” (or “UNE-P”). (MCI Agreement, App. UNE, §1.8.2.6.7) The Agreement goes on to provide that the prices for UNEs shall be as established by the Commission as set out in Appendix Pricing, Attachment 1. (MCI Agreement, Appendix Pricing, §1). MCI and Pacific

Bell have amended the Agreement to incorporate the UNE prices adopted by the Commission in its May 21, 2002, Interim Opinion (D.02-05-042) and its September 21, 2004, Opinion Establishing Revised Unbundled Network Element Rates for Pacific Bell Telephone Company dba SBC California (D.04-09-063) in that same proceeding. Those rates remain in effect in the MCI Agreement today.

7. Blue Casa, WAT, Call America, TCAST, and Telekenex have each adopted, pursuant to 47 U.S.C. § 252(i), interconnection agreements with Pacific Bell that, in all respects material to this Motion, contain provisions that are identical to the MCI Agreement. Collectively, the Joint CLECs' interconnection agreements are referred to herein as the "Agreements."

8. Each of the Agreements specify the steps to be taken if a party wants to amend the Agreement because of a change in the law. The Agreements provide in General Terms and Conditions, §29.18:

#### 29.18 Intervening Law

This Agreement is entered into as a result of both private negotiation between the Parties and the incorporation of some of the results of arbitration by the California Public Utilities Commission. If the actions of the State of California or federal legislative bodies, courts, or regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of laws or regulations that were the basis or rationale for a provision of the contract, the affected provision shall be invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either party. In the event of any such actions, the Parties shall expend diligent efforts to arrive at an agreement respecting the appropriate modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement. The Parties acknowledge that on January 25, 1999 the US Supreme Court issued its opinion in AT&T Corp v. Iowa Utilities Board. The Parties further acknowledge and agree that by executing this Agreement, neither Party waives any of its rights, remedies or arguments

with respect to such decision and any remand thereof, including its rights under this Intervening Law paragraph.

9. When the parties are unable to agree on how to implement a change in the law, they are directed to pursue dispute resolution. The Agreements' dispute resolution provisions are contained in General Terms and Conditions, § 29 and provide that the CLEC and Pacific Bell shall first attempt to resolve disputes informally through negotiation in good faith (§§ 29.13.2 and 29.13.5.1). Sections 29.13.6 and 29.13.6.3 provide that if the CLEC and Pacific Bell are unable to resolve the dispute through the informal dispute resolution procedure they either may elect arbitration (with the exception of some types of disputes), or "may proceed with any remedy available to [the party] pursuant to law, equity or agency mechanism." Actions seeking a temporary restraining order or an injunction related to the purposes of the Agreement or to compel compliance with the dispute resolution process are not subject to arbitration. (§ 29.13.6.4)

10. On February 4, 2005, the FCC issued the *TRRO*. In the *TRRO*, the FCC determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Act. The FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within twelve months of the effective date of the *TRRO*. (*TRRO* ¶ 227.) The FCC determined that the price during the transition period for unbundled switching provided pursuant to § 251(c)(3) would be the higher of (i) the CLEC's UNE-P rate as of June 15, 2004 plus one dollar, or (ii) the rate established by a state commission between June 16, 2004 and the effective date of the *TRRO* plus one dollar. (*TRRO* ¶ 228.)

11. With respect to new UNE-P orders placed after the effective date of the *TRRO*, the FCC stated: "The transition period shall apply only to the embedded customer

base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order.*” (*TRRO* ¶ 227, emphasis supplied.)

12. The *TRRO* does not purport to abrogate the change of law provisions of carriers’ interconnection agreements. To the contrary, the FCC’s *TRRO* decision directs carriers to implement the FCC rulings by negotiating changes to their interconnection agreements:

We expect that incumbent LECs and competing carriers will implement the Commission’s findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay. (*TRRO* ¶ 233, footnotes omitted.)

13. SBC issued several “Accessible Letters” on February 11, 2005, in which it notified CLECs that the *TRRO* had been released and how it intended to respond to the *TRRO*. Among other things, SBC stated, in one Accessible Letter, that under the *TRRO* “CLECs ‘may not obtain,’ and SBC and other ILECs are not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops. Therefore, CLECs may not place, and SBC will not longer provision New, Migration or Move Local Service Requests (LSRs) for Mass Market Unbundled Local Switching and the UNE-P.” True and correct copies of the February 11 Accessible Letters are attached hereto as Exhibit A.

14. As is more fully explained in the attached affidavit of Kathy Jespersen, the Joint Movants believe that SBC's refusal to accept new orders will prevent CLECs from obtaining new customers, and SBC's refusal to accept moves, adds, and changes for orders submitted on behalf of CLECs' existing, embedded customer base will result in inadequate service for those existing customers. For example, if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005, to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request.

15. By letter dated February 18, 2005, MCI responded to the February 11 Accessible Letters. MCI notified SBC that the actions it threatens would constitute breaches of the MCI Agreement. MCI requested SBC to provide adequate assurance by February 25, 2005, that it would perform as provided for in the MCI Agreement. MCI also informed SBC that it might file legal pleadings before SBC responded to the letter, but stated that it remains willing to resolve this matter outside the legal process. A true and correct copy of MCI's February 18 letter is attached as Exhibit 1 to the affidavit of Kathy Jespersen that accompanies this Motion.

**SBC's REFUSAL TO ACCEPT AND PROCESS ORDERS  
WOULD BREACH THE AGREEMENTS**

16. The Agreements require SBC to provide UNE-P to Joint Movants at the prices specified in the Agreements. (*See, e.g.,* MCI Agreement, Appendix Pricing.) Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC must continue to accept and provision Joint CLECs' UNE-P orders at the

specified rates. By stating that it will not accept UNE-P orders beginning March 11, 2005, SBC has breached the Agreements.

17. The *TRRO* does not excuse or justify SBC's stated intention to refuse to accept Joint CLECs' UNE-P orders beginning March 11, 2005, because the *TRRO* requires that its rulings be implemented through changes to parties' interconnection agreements. Moreover, implementing the change of law with respect to new UNE-P orders will not merely be an academic exercise because the parties will need to address, among other issues, SBC's duty to continue to provide UNE-P to Joint CLECs at current rates under state law or, alternatively, at just and reasonable rates under § 271 of the Federal Act.

**SBC HAS NO RIGHT TO REFUSE TO FOLLOW THE  
CHANGE OF LAW PROCESS**

18. The Agreements do not permit parties to implement changes in law unilaterally. To the contrary, upon a change of law "the Parties shall expend diligent efforts to arrive at an agreement respecting the appropriate modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement." (*See, e.g.*, MCI Agreement, Appendix General Terms and Conditions, §29.18.) By stating its intention to ignore the change of law provision in the parties' Agreements, SBC has breached the Agreements.

19. The Agreements' dispute resolution provisions provide for a notice of dispute and that the parties shall first attempt informal resolution of disputes through negotiation in good faith:

29.13.2. Alternative to Litigation

29.13.2.1 The Parties desire to resolve disputes arising out of this Agreement without litigation. Accordingly, the Parties agree to use the following Dispute Resolution procedures with respect to any controversy or claim arising out of or relating to this Agreement or its breach.

29.13.3 Commencing Dispute Resolution

29.13.3.1 Dispute Resolution, as defined below, shall commence upon one Party's receipt of written notice of a controversy or claim arising out of or relating to this Agreement or its breach. No Party may pursue any claim unless such written notice has first been given to the other Party. There are three (3) separate Dispute Resolution methods:

29.13.3.1.1 LSC;

29.13.3.1.2 Informal Dispute Resolution; and

29.13.3.1.3 Formal Dispute Resolution,

each of which is described below.

\* \* \* \* \*

29.13.5 Informal Resolution of Disputes

29.13.5.1 Upon receipt by one Party of notice of a dispute by the other Party pursuant to Section 29.13.3 or Section 29.13.4.5, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. The location, form, frequency, duration, and conclusion of these discussions will be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative Dispute Resolution procedures such as mediation to assist in the negotiations. Discussions and the correspondence among the representatives for purposes of settlement are exempt from discovery and production and will not be admissible in the arbitration described below or in any lawsuit without the concurrence of both Parties. Documents identified in or provided with such communications that were not prepared for purposes of the negotiations are not so exempted, and, if otherwise admissible, may be admitted in evidence in the arbitration or lawsuit.

(See, e.g., MCI Agreement, General Terms and Conditions, §29.13)

20. The *TRRO* does not excuse or justify SBC's failure to comply with the change of law provisions of the Agreements. Paragraph 227 of the *TRRO* states that the twelve month transition period "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order.*" (Emphasis added.) The *TRRO* requires that parties "implement the Commission's findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." (*TRRO* ¶ 233.) The *TRRO* does not exclude its provisions relating to new UNE-P orders from this requirement. Therefore, under the *TRRO* and the Agreements, SBC must undertake the change of law process to implement the changes specified in the *TRRO* with respect to (among other issues) new UNE-P orders.

21. Foremost among the difficult issues that the parties must resolve through negotiation and arbitration are (i) whether SBC can use the *TRRO* to evade its independent UNE unbundling obligations and rates under California state law and (ii) whether SBC can use the *TRRO* to evade its independent unbundling obligations and prices under section 271 of the Federal Act. It was precisely because parties and state commissions must resolve these and other issues that the FCC mandated that the terms of the *TRRO* be implemented through changes to the parties' interconnection agreements. And, as shown below, they also serve as independent grounds for continuing to enforce the Agreement as written and approved.

#### **SBC HAS A DUTY TO PROVIDE UNE-P UNDER STATE LAW**

22. Even if SBC were empowered by the *TRRO* unilaterally to change Joint CLECs' UNE-P rights that arise out of section 251(c)(3) (which it is not), SBC would not be entitled to change the unbundling and UNE rate sections of the Agreements unilaterally

because the PU Code and the orders this Commission has issued pursuant to the PU Code independently support Joint CLECs' right to obtain UNE-P from SBC at the just and reasonable rates now set forth in the Agreement.

23. In 1994, through its enactment of Public Utilities Code § 709.2, the California Legislature established fair unbundling of ILEC facilities as a statutory mandate. That section directed the Commission, as a prerequisite to permitting interLATA entry by SBC, to determine that:

[A]ll competitors have fair, nondiscriminatory, and mutually open access to exchanges currently subject to the modified final judgment and interexchange facilities, including fair unbundling of exchange facilities, as prescribed in the commission's Open Access and Network Architecture Development Proceeding (I.93-04-003 and R.93-04-003.)

24. As the statute, itself, suggests, by the time of its enactment, network unbundling already had been established as a fundamental component of state telecommunications policy developed by the Commission. Indeed, in 1989, when the Commission first embarked upon efforts to establish a new regulatory framework for competitive telecommunications markets, the Commission recognized, in principle, that "unbundling and nondiscriminatory access to monopoly services are important tools in ensuring that the local exchange carriers do not favor their own competitive services at the expense of either monopoly ratepayers or competitors." (D.89-10-031, 33 CPUC 2d 43 at 120.)

25. Then, in the OANAD proceeding (I.93-04-003/R.93-04-003), which the Commission established in order to implement its previously-adopted unbundling principle, the Commission confirmed the importance of unbundling to carrying out its goal of opening the telecommunications market fully to competition:

“Let us be clear: openness is the principle which should guide the design of tomorrow’s more advanced networks that will be deployed by the LECs. We will frown on the deployment of closed architecture systems by holders of monopoly bottlenecks with common carrier responsibilities. While it is true that we left specific investment decisions to the discretion of Pacific and GTEC in D.89-10-031, we also in that same decision articulated our policy of unbundling and nondiscriminatory access to monopoly building blocks. Pacific and GTEC are free to make whatever investment decisions necessary to develop tomorrow’s telecommunications network, but must do so in a manner that is compatible with our articulated public policy of open, nondiscriminatory access.” (Order Instituting Rulemaking, 193 Cal.PUC Lexis 301, \*27.)

26. In early 1996, when the Commission established rates for resale of finished ILEC services in order to provide a means to allow CLECs to begin entering the local market, the Commission reiterated that network unbundling remained the ultimate policy and that providing a resale opportunity was intended only as an interim, quick fix:

“In the OANAD proceeding, parties will be developing TSLRIC studies which will be used to develop wholesale rates for unbundled network elements. Once these rates are adopted in OANAD, we shall begin to use them to replace the interim wholesale rates adopted in this order.” (D.96-03-020 at 20.)

27. Again, several years later, when ILECs sought to deny CLECs the ability to effectively access and utilize unbundled loops, local switching, and transport in a UNE-P configuration on the grounds that they were not required to do so by federal law, the Commission rejected their attempt, reminding the ILECs that such unbundling is required as a matter of state policy. (*See, e.g.*, D.01-03-044 at 10.)

28. Thus, fair unbundling, which the Commission has repeatedly held includes the provision of UNE-P combinations, remains state telecommunications law and policy, today.

29. Accordingly, there is an on-going and urgent need for the Commission to enforce existing law and state policy mandating fair unbundling of SBC’s exchange network facilities. In order to enforce existing state law and policy, the Commission needs to

maintain the status quo by requiring SBC to continue to offer unbundled local switching, basic loops, and unbundled common transport in UNE-P combinations at the currently-established rates.

**SBC'S STATE UNBUNDLING OBLIGATIONS ARE NOT  
PREEMPTED**

30. This Commission's authority to require SBC to unbundle its network at just and reasonable rates has not been preempted by federal law. Preemption occurs when (i) Congress "occupies the field" in the area the state seeks to regulate; (ii) the federal government expressly preempts state regulation; or (iii) there is a conflict between state and federal law. None of these conditions has occurred.

31. In the *TRO*, the FCC recognized that provisions in the Federal Act preserving state authority demonstrate that Congress did not intend to occupy the field with respect to unbundling. For example, the FCC ruled: "We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act." (*TRO* ¶ 192, footnotes omitted.)

32. None of the pronouncements of the FCC in the *TRRO* or the *TRO* demonstrate that agency's intent to preempt the PU Code's authorization of state unbundling, or the Commission's orders implementing unbundling under California state law. Although the *TRO* contained what the D.C. Circuit dubbed the FCC's "general prediction" about when state agency actions regarding unbundling might be preempted, the *USTA II* court held that the "general prediction voiced in ¶ 195 does not constitute final agency action, as the [FCC] has not taken any view on any attempted state unbundling order." (*USTA II*, 359 F.3d at 594 [emphasis added].) The court therefore found claims of preemption based on the *TRO*

“unripe,” and upheld the FCC’s actions against such claims. (*Id.*) In the *TRRO*, the FCC addressed “those issues that were remanded to us” by *USTA II*. (*TRRO* ¶ 19.) Because the D.C. Circuit in *USTA II* found no preemption had been attempted in the *TRO*, preemption was not one of the issues remanded to the FCC for consideration in the *TRRO*. Nothing in the *TRRO* changes the FCC’s position in this regard. In fact, preemption is not mentioned anywhere in the *TRRO*.

33. Moreover, the FCC’s authority to preempt such state action is subject to significant statutory limitation. Pursuant to 47 U.S.C. § 251(d)(3), the authority of state commissions to adopt their own regulations, orders, or policies on network unbundling is preserved so long as such regulations, orders, or policies do not “*substantially* prevent implementation of the requirements of [§ 251] and the purposes of *this part* [i.e., §§ 251-261].” (Emphasis added.) A review of those sections reveals no requirement or purpose whose implementation would be prevented, much less substantially prevented, by the action that the Commission must take in order to comply with state law and policy in this instance.

34. What is more, even if the *TRO* and *TRRO* had explicitly purported to preempt state commissions from requiring ILECs to unbundled local switching and transport, the Commission would still be obligated to carry out California’s state unbundling policy as declared by Public Utilities Code § 709.2 until such time as the preemption order were upheld by an appellate court. Under section 3.5 of the California Constitution, the Commission “has no power . . . [t]o declare a statute unenforceable or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.” Again, though, there has been no

determination by the FCC that would demonstrate that requiring SBC to continue to provide unbundled local switching and transport would substantially interfere with the purposes of federal law. Therefore, California's well-established, long-standing unbundling policy remains valid and must be enforced by the Commission until changed by valid state process.

35. The fact of the matter is, however, that the Commission's unbundling and pricing orders do not conflict with federal law. Under the Federal Act, SBC is still required to provide access to unbundled local switching under section 271, notwithstanding the FCC's determination, in the context of section 251(c)(3), that such unbundling should not be mandated. Moreover, the FCC has held that section 271 checklist elements must be provided at "just and reasonable" rates, the same pricing standard that this Commission has always employed in establishing telephone rates in California, including its determination a decade ago, before enactment of any federal unbundling requirements, that the pricing for unbundled network elements should be based on forward-looking incremental costs. (D.95-12-016.) This Commission's pricing standard therefore does not conflict with federal law.

36. The FCC has increased the rates for section 251(c)(3) unbundled switching during the transition period above the state rates established by the Commission for SBC in D.04-09-063. That difference does not result in a conflict between federal and state law. In any case, however, the proper way to resolve any dispute concerning this point is not self-help on SBC's part, but rather by working through the change of law process in the Agreements. Until that process has been completed, SBC should not be allowed to change the rates ordered by the Commission and incorporated into the Agreements.

**SBC HAS A DUTY TO PROVIDE UNE-P UNDER SECTION 271  
OF THE FEDERAL ACT**

37. Even if SBC were empowered by the *TRRO* unilaterally to change Joint Movants' UNE-P rights that arise out of section 251(c)(3) (which it is not), SBC would not be entitled to change the unbundling and UNE rate sections of the Agreements unilaterally because section 271 of the Federal Act independently supports Joint Movants' rights to obtain UNE-P from SBC at the just and reasonable rates set forth in the Agreement.

38. As the FCC affirmed in the Triennial Review Order, so long as SBC wishes to continue to provide in-region interLATA services under section 271 of the Federal Act, it "must continue to comply with any conditions required for [§271] approval" (*TRO* ¶ 665), and that is so whether or not a particular network element must be made available under section 251. One of the central requirements of section 271 is that a Bell Operating Company enter into "binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities." (Federal Act, § 271(c)(1)(A).) Those agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist. (*Id.* §271(c)(2)(A)(ii).) That checklist requires that the agreement must provide for local switching. (*Id.* § 271(C)(2)(B)(vi).) To satisfy the requirements of the checklist the interconnection agreement must provide unbundled switching at a rate deemed just and reasonable. (*Id.*; *TRO*, ¶¶ 662-664.).

39. SBC is required to provide section 271 local switching as part of the UNE-P combination. Although the FCC in the *TRO* declined to require SBC to combine section 271 local switching with other UNEs pursuant to section 251(c)(3), (*see TRO* ¶ 655 & n.1989), and that decision was upheld in *USTA II*, the D.C. Circuit noted that the general

nondiscrimination requirement of section 202 might provide an independent basis for requiring the combination of section 271 switching with other UNEs. *USTA II*, 359 F.3d at 590.

40. Providing unbundled mass market switching in isolation provides nothing of value to CLECs because SBC owns the loop plant that serves consumers in its service territory. If SBC were to provide unbundled switching to CLECs in isolation, while providing switching to its retail business combined with all the other elements needed to provide service, SBC would discriminate against CLECs in violation of section 202 of the Federal Act. SBC therefore must provide section 271 switching in combination with the other elements that make up UNE-P, certainly under its current Agreements and in any event under current law, even as changed by the *TRRO*.

41. As noted above, this Commission has necessarily determined that the UNE rates in the Agreement are “just and reasonable” under California law. Joint Movants submit, therefore, that until this Commission or the FCC reaches some other conclusion, the rates in the Agreements should be determined to be “just and reasonable” under section 271.

**THE AGREEMENTS ARE NOT SEVERABLE AND ANY  
IMPLEMENTATION OF CHANGE OF LAW MUST BE  
COMPREHENSIVE AND NOT PIECEMEAL AND  
SELECTIVELY ONE-SIDED**

42. General Terms and Conditions, Section 25 of the each of the Agreements provides in pertinent part:

25.1 The Parties negotiated the services, arrangements, Interconnection, terms and conditions of this Agreement as a total arrangement and it is intended to be nonseverable, subject only to Section 29.16 of this Agreement.

Section §29.16 deals with Pacific's §251(i) obligations to allow carriers to "opt-in" to another carrier's interconnection agreement and does not change the effect or import of §25 with respect to amending the Agreements to incorporate changes of law. As we show below, SBC's effort to unilaterally deny CLECs UNE-P orders violates §25 by attempting to selectively implement any TRRO changes of law in a piecemeal and lopsided fashion.

**1. BATCH HOT CUTS NEED TO BE ADDRESSED AND  
RESOLVED AS PART OF INTERCONNECTION  
AMENDMENTS WITH SBC**

43. The FCC, in its recently released *TRRO*, ruled that for purposes of Section 251 of the Federal Act there is no impairment without unbundled switching. The FCC based its ruling, in part, on the availability of batch hot cut processes. The FCC was also quite clear that state commissions could further refine these batch hot cut processes. The FCC stated in part as follows:

The record indicates that many incumbent LECs are developing further improvements to their hot cut process, through the development of batch hot cut procedures. For example, each of the BOCs has developed a batch hot cut process allowing for a competitive LEC to have multiple customer lines converted to competitive LEC networks within a short time. . . . Some states only initiated batch hot cut proceedings in response to the *Triennial Review Order*, and have not completed those proceedings. We emphasize, however, that regardless of the status of the state proceedings, each of the BOCs has adopted batch hot cut processes throughout its territory and has based its advocacy with regard to unbundled mass market local switching on the continued availability of these processes. . . . In light of these new procedures, we cannot conclude that the hot cut processes will be insufficiently scalable to handle those lines that are transitioned from UNE-P to UNE-L arrangements. Rather, any inadequacies in carriers' hot cut performance can be addressed through enforcement of interconnection agreements and, in the case of BOCs, complaints pursuant to section 271(d)(6). (*TRRO*, par. 211 and note 569).

\* \* \*

We also disagree with MCI's suggestion that other operational barriers associated with specific hot cut scenarios, such as those involving

conversions from UNE-P to EELs or UNE-P to UNE-L line splitting, preclude competition in the absence of unbundled mass market switching. First, although MCI suggests that hot cuts involving EELs are unavailable, the record belies that assertion. Specifically, the evidence before us indicates that MCI has not yet requested such hot cuts from incumbent LECs, and, moreover, that incumbent LECs are willing to provide such hot cuts. Second, regarding the UNE-P to UNE-L line splitting scenario, MCI expresses concerns about the processes used by a limited number of incumbent LECs, primarily SBC. However, the Commission has chosen to encourage parties to use state collaboratives to work out the processes necessary to support line splitting, which we believe is a better approach to addressing such concerns than requiring unbundled access to mass market switching. (*TRRO*, par. 217, footnotes omitted).

44. The FCC also clearly stated that the appropriate mechanism for addressing concerns about the sufficiency of batch hot cut processes includes state commission enforcement processes and section 208 complaints to the FCC. (*TRRO*, note 581).

45. The FCC in the *TRRO* has now made its finding with respect to “impairment,” and under the *TRRO* no “impairment” determinations have been delegated to the states. Consistent with this finding of non-impairment based in part on the availability of batch hot cuts, the FCC has directed the states to further refine the batch hot cut processes. Accordingly, this Commission has ample authority to address batch hot cuts. The exact process which must be used by SBC for batch hot cuts, and the corresponding rates, will likely need to be addressed in the interconnection agreement amendments. Disputes about what exact batch hot cut process should be used and what should be included in such a process may be issues for dispute resolution by this Commission if the parties can not resolve these issues by negotiation or informal dispute resolution.

**2. TERMS FOR PROVISIONING OF HIGH CAPACITY LOOPS AND TRANSPORT AND “COMMINGLING” ALSO NEED TO BE IMPLEMENTED**

46. *TRRO* and *TRO* changes of law also affect continued access to UNEs under changed terms and conditions aside from UNE-P. For example, see *TRRO* ¶¶ 20-27 and ¶¶ 41-47, regarding continued access to high capacity loops and transport, and *TRO* ¶ 597, dealing with the commingling of exchange access and local exchange services traffic on certain UNEs. Any *TRRO* related change of law negotiation or dispute resolution must address all *TRO* and *TRRO* changes of law in their entirety and comprehensively as they affect the totality of each of the Agreements as a whole.

**PRAYER FOR RELIEF**

WHEREFORE, for the foregoing reasons, Joint Movants respectfully request that the Commission:

- (1) Order SBC to continue accepting and processing Joint Movants' UNE-P orders under the rates, terms and conditions of the Agreements;
- (2) Order SBC to comply with the change of law and dispute resolution provisions of the Agreement with regard to the implementation of the *TRRO*;
- (3) Order such further relief as the Commission deems just and appropriate.

Respectfully submitted, this 1<sup>st</sup> day of March, 2005.

William C. Harrelson  
Senior Counsel  
MCI, Inc

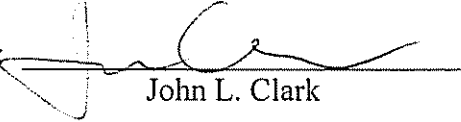
Regina Costa  
Telecommunications Research Director  
TURN

Glenn Stover  
STOVERLAW

and

GOODIN, MACBRIDE, SQUERI,  
RITCHIE & DAY, LLP

By:

A handwritten signature in black ink, appearing to read "John L. Clark", is written over a horizontal line. The signature is stylized with a large, looped "C" and a long, sweeping underline.

John L. Clark

Attorneys for Joint Movants

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion into Competition for  
Local Exchange Service

R.95-04-043

Order Instituting Investigation on the  
Commission's Own Motion into Competition for  
Local Exchange Service

I.95-04-044

**AFFIDAVIT OF KATHY JESPERSEN**

STATE OF ILLINOIS                    )  
  ) ss:  
COUNTY OF COOK                    )

Kathy Jespersen, being first duly sworn on oath, hereby, deposes and states as follows:

1.       I am currently employed by MCI, Inc. as a Senior Manager in the National Carrier Management and Initiatives Organization. I have held this position since January 1999. In the course of my responsibilities, I am responsible for the negotiation of local interconnection agreements ("ICAs") between wholly-owned subsidiaries of MCI, Inc. and SBC, BellSouth, Sprint and Cincinnati Bell. I am also the designated contract notices manager for all of the interconnection agreements between MCI, Inc.'s California local service entities (collectively "MCI") and Pacific Bell Telephone Company, Inc. d/b/a SBC ("SBC"). As a result of these duties, I have personal knowledge of the matters addressed herein.

2.       The currently effective interconnection agreement between MCI Metro Access Transmission Services, LLC and Pacific Bell Telephone Company ("Pacific") ("ICA") became effective on September 25, 2001 as the result of arbitration in Commission proceeding A.01-01-010 and the Commission's decision ("D.") 01-09-054, dated September 20, 2001. Subsequently, MCI's other California subsidiaries adopted that interconnection agreement and those too remain

in effect. There have been a couple of amendments to those agreements that were limited to implementing Commission pricing decisions in the pricing appendices of the interconnection agreements.

3. On February 11, 2005, SBC Communications, Inc. ("SBC") issued a series of accessible letters to all CLECs ("Feb. 11<sup>th</sup> Accessible Letters") announcing SBC's intention to, as of March 11, 2005, reject all of CLECs' requests for new UNE-P orders, as well as requests for moves, adds, and changes for any of CLECs' embedded UNE-P customer base. A true and correct copy of this referenced series of accessible letters (CLECALL05-016, -017, -18, -019 and -020, all dated February 11, 2005) is attached as **Exhibit A** to the accompanying "Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders." Based on information and belief Pacific is a wholly owned subsidiary of SBC.

4. In the course of my duties, I frequently interface with MCI's business units, including those responsible for serving our mass markets (residential) customers. This frequent communication ensures that I can pursue MCI's business needs to the fullest possible extent in the course of negotiating interconnection agreements and amendments. Based on the knowledge I have from these interactions with our mass markets business unit, it is my understanding that if SBC indeed rejects MCI's requests for new UNE-P orders as announced in the Feb. 11<sup>th</sup> Accessible Letters, MCI will be adversely affected in its efforts to provide reasonably adequate service to its mass markets customers. Consequently, SBC's refusal to process MCI's requests could result in the loss of MCI's existing mass markets customers, as well as prevent it from obtaining new mass markets customers.

5. The Feb. 11<sup>th</sup> Accessible Letters are inconsistent with my understanding of the directives of the FCC's February 4, 2005 Triennial Review Remand Order ("*TRRO*"), which

require SBC to continue to process CLEC requests for moves, adds and changes for MCI's existing customer base during a twelve-month transition period that begins March 11, 2005. This twelve-month transition period is critical to MCI's ability to serve its current customers seamlessly and without interruptions in service. Furthermore, nothing in the *TRRO* precludes the continued processing of new UNE-P orders by purchasing switching at "just and reasonable" rates under Section 271 of the Telecommunications Act of 1996.

6. SBC's refusal to accept new orders will prevent MCI from obtaining new customers, and SBC's refusal to accept moves, adds, and changes for orders submitted on behalf of MCI's existing, embedded customer base will result in inadequate service for those existing customers. For example, if an MCI customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks MCI on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, MCI will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of MCI's change request.

7. On February 18, 2005, MCI wrote to SBC to indicate that it considered the Feb. 11<sup>th</sup> Accessible Letters to be an anticipatory breach of MCI's interconnection agreement with SBC, as well as a violation of the notice, change of law, and dispute resolution terms thereof. A true and correct copy of that letter, from Michael Beach, Vice President – Carrier Management of MCI to SBC's Notices Manager and Glenn Sirles, Vice-President and General Manager for Local Interconnection Services at SBC, is attached hereto as **Exhibit 1** ("Beach Letter"). The Beach Letter demanded adequate assurance from SBC by February 25<sup>th</sup> that SBC would continue to perform under the terms of the MCI/SBC ICA despite the statements in the February 11<sup>th</sup> Accessible Letters. (See Beach Letter, Exhibit 2, at p. 2).

8. Under the Appendix General Terms and Conditions, Section 29.18 of the MCI/Pacific ICA, if SBC wishes to amend the ICA due to an asserted change of law, SBC must first “expend diligent efforts to arrive at an agreement” and “if negotiations fail” it must follow the dispute resolution process provided for in the ICA:

29.18 Intervening Law

This Agreement is entered into as a result of both private negotiation between the Parties and the incorporation of some of the results of arbitration by the California Public Utilities Commission. If the actions of the State of California or federal legislative bodies, courts, or regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of laws or regulations that were the basis or rationale for a provision of the contract, the affected provision shall be invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either party. In the event of any such actions, the Parties shall expend diligent efforts to arrive at an agreement respecting the appropriate modifications to the Agreement. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement. The Parties acknowledge that on January 25, 1999 the US Supreme Court issued its opinion in AT&T Corp v. Iowa Utilities Board. The Parties further acknowledge and agree that by executing this Agreement, neither Party waives any of its rights, remedies or arguments with respect to such decision and any remand thereof, including its rights under this Intervening Law paragraph.

9. The Agreement’s dispute resolution provisions are contained in Appendix General Terms and Conditions, Section 29.13 and provide for a notice of dispute and that MCI and Pacific shall first attempt informal resolution of disputes through negotiation in good faith:

29.13.2. Alternative to Litigation

29.13.2.1 The Parties desire to resolve disputes arising out of this Agreement without litigation. Accordingly, the Parties agree to use the following Dispute Resolution procedures with respect to any controversy or claim arising out of or relating to this Agreement or its breach.

29.13.3 Commencing Dispute Resolution

29.13.3.1 Dispute Resolution, as defined below, shall commence upon one Party's receipt of written notice of a controversy or claim arising out of or relating to this Agreement or its breach. No Party may pursue any claim unless such written notice has first been given to the other Party. There are three (3) separate Dispute Resolution methods:

29.13.3.1.1 LSC;

29.13.3.1.2 Informal Dispute Resolution; and

29.13.3.1.3 Formal Dispute Resolution,

each of which is described below.

\* \* \* \*

29.13.5 Informal Resolution of Disputes

29.13.5.1 Upon receipt by one Party of notice of a dispute by the other Party pursuant to Section 29.13.3 or Section 29.13.4.5, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. The location, form, frequency, duration, and conclusion of these discussions will be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative Dispute Resolution procedures such as mediation to assist in the negotiations. Discussions and the correspondence among the representatives for purposes of settlement are exempt from discovery and production and will not be admissible in the arbitration described below or in any lawsuit without the concurrence of both Parties. Documents identified in or provided with such communications that were not prepared for purposes of the negotiations are not so exempted, and, if otherwise admissible, may be admitted in evidence in the arbitration or lawsuit.

10. SBC did not engage in *any* negotiations with MCI regarding the subject matter of the Feb. 11<sup>th</sup> Accessible Letters and, thus, SBC failed to comply with the change of law and dispute resolution requirements of Sections 29.18 and 29.13 of the General Terms and Conditions of the SBC/MCI ICAs with respect to the subject matter of the Feb. 11<sup>th</sup> Accessible Letters.

11. Thus, SBC has failed to comply with the notice, intervening law and dispute resolution provisions under the MCI/Pacific ICAs in connection with the Feb. 11<sup>th</sup> Accessible Letters, in violation of the MCI/Pacific ICAs.

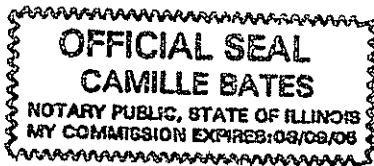
Further affiant sayeth not.

Dated this 28th day of February, 2005.

Kathy Jespersen  
Kathy Jespersen

Subscribed and sworn to before me  
this 28<sup>th</sup> day of February, 2005.

Camille Bates  
Notary Public, State of Illinois  
My Commission Expires: August 9, 2005



# ATTACHMENT C

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

COMPLAINT OF INDIANA BELL TELEPHONE )  
COMPANY, INCORPORATED D/B/A SBC INDIANA )  
FOR EXPEDITED REVIEW OF A DISPUTE WITH )  
CERTAIN CLECS REGARDING ADOPTION OF AN )  
AMENDMENT TO COMMISSION APPROVED )  
INTERCONNECTION AGREEMENTS )

Cause No. 42749

**JOINT MOTION FOR EMERGENCY ORDER**  
**PRESERVING STATUS QUO FOR UNE-P ORDERS**

Pursuant to I.C. 8-1-2-113, Acme Communications, Inc. ("Acme"), eGIX Network Services, Inc. ("eGIX"), Cinergy Communications Company ("CCC"), Midwest Telecom of America, Inc. ("MTOA"), MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc. and Intermedia Communications, Inc. (collectively, "MCI"), Trinsic Communications, Inc. and Talk America Inc. ("Talk America") (collectively "Joint CLECs") file this Motion for Emergency Order Preserving Status Quo for UNE-P Orders because SBC Indiana has stated that it intends to take actions on or after March 11, 2005 that will cause irreparable harm to the Joint CLECs and that will breach SBC Indiana's currently effective, Commission-approved interconnection agreements ("Agreements") with the Joint CLECs.

In order to avoid suffering irreparable damage to their businesses, the Joint CLECs request the Commission issue a directive immediately, but **no later than March 7, 2005**, requiring SBC Indiana to continue accepting and processing the Joint CLECs' UNE-P orders, including moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of their respective

Agreements. The Joint CLECs further request that the Commission direct SBC Indiana, consistent with the January 21, 2005 Docket Entry in this Cause, to comply with the change of law provisions of the respective Agreements with regard to implementation of the FCC's recently issued Triennial Review Remand Order ("*TRRO*").

SBC Indiana has stated that it will reject UNE-P orders beginning March 11, 2005 pursuant to its interpretation of the *TRRO*. This course of action could paralyze the Joint CLECs' business operations by precluding Joint CLECs from performing basic services for their existing, embedded customer base, such as requests to make moves, adds, or changes to the customers' existing accounts, as well as by prohibiting them from obtaining new customers. Additionally, SBC's unilateral proclamations that it will reject UNE-P orders on March 11, 2005 and withdraw its Indiana tariffs on March 13, 2005 will breach the Joint CLECs' Agreements in at least three respects: (i) by rejecting UNE-P orders that SBC Indiana is obligated by the Agreements to accept and process; (ii) by refusing to comply with the change of law procedure established by the Agreements for amendments thereto; and (iii) by refusing to process new orders that Joint CLECs are entitled to place by purchasing unbundled local switching under Section 271 of the Federal Act. Contrary to statements in SBC Indiana's Accessible Letters that have been issued to competitive local exchange carriers ("CLECs"), including Joint CLECs, the *TRRO* does not excuse or justify SBC Indiana's stated intention of rejecting Joint CLECs' UNE-P orders beginning March 11, 2005 and ignoring the change of law processes of its Agreements with CLECs with respect to such UNE-P orders.

Each of the Joint CLECs wishes to continue placing UNE-P orders (including orders to make moves, adds, or changes to the accounts of the Joint CLECs' existing,

embedded customers) in Indiana after March 10, 2005. Each of the Joint CLECs is also willing to begin negotiations with SBC promptly pursuant to the change of law provisions in their interconnection agreements; indeed, a number of CLECs have already requested that SBC begin such negotiations. Unless this Commission declares that SBC Indiana may not reject such UNE-P orders, and instead must comply with the change of law provision in its Agreements, Joint CLECs will sustain immediate and irreparable injury. Indiana consumers currently benefiting from the local service Joint CLECs offer in Indiana also will be injured by SBC Indiana's planned illegal actions. Joint CLECs therefore request that the Commission consider this matter on an emergency basis and grant the relief requested in this Motion on or **before March 7, 2005**. Because of the imminent threat to the Joint CLECs' businesses posed by SBC's unlawful and unilateral attempts to bypass its contractual obligations, Joint CLECs reserve their right to, and may be forced to, seek injunctive relief before an appropriate court if the Commission has not ruled on this Motion on or before **March 7, 2005**.

### **PARTIES**

1. Joint CLECs have each been granted Certificates of Territorial Authority by the Commission, and each of the Joint CLECs is authorized to provide local exchange service in Indiana.<sup>1</sup> Each of the Joint CLECs is a "telecommunications carrier" and "local exchange carrier" under the Telecommunications Act of 1996 ("Federal Act"). As delineated in the attached affidavits, each of the Joint CLECs has a currently-effective, Commission-approved interconnection agreement with SBC Indiana.

---

<sup>1</sup> The Commission approved the cancellation of Intermedia Communications, Inc.'s Certificate of Territorial Authority on December 16, 2004 at MCI's request because Intermedia's operations and assets were merged into MCImetro Access Transmission Services LLC. Intermedia continues to have an interconnection agreement with SBC Indiana.

2. SBC Indiana has been granted a Certificate of Territorial Authority by this Commission, and it provides local exchange service in Indiana as an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Telecommunications Act of 1996 ("Federal Act").

### **JURISDICTION**

3. Joint CLECs and SBC Indiana are subject to the jurisdiction of the Commission with respect to the matters raised in this Motion.

4. The Commission has jurisdiction with respect to the matters raised in this Motion under I.C. 8-1-2-4, 8-1-2-5, 8-1-2-54, 8-1-2-58, 8-1-2-68, 8-1-2-69, 8-1-2-113, 8-1-2.6, and related statutes.

5. The Commission also has jurisdiction under the Federal Act under 47 U.S.C. § 251(d) (3) (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) with respect to the matters raised in this Motion.

### **FACTS**

6. As is set forth in the Affidavit of each respective Joint CLEC attached hereto as **Exhibits 1 through 7**, each of the Joint CLECs has entered into an interconnection agreement with SBC Indiana. The Agreements generally provide that SBC Indiana shall provision Unbundled Network Element ("UNE") combinations including the combination of Network Element Platform or UNE-P. The Agreements also generally provide that the price for these combinations of Network Elements shall be based upon applicable FCC and Commission rules. Some of the Agreements refer to and incorporate tariffed terms, conditions and pricing for unbundled network elements, and/or

explicitly acknowledge that certain unbundled network elements and products may be purchased from SBC Indiana's tariffs.

7. The Agreements also specify the steps to be taken if a party wishes to amend the Agreement because of a change in the law. The specific change of law terms of each of the Joint CLECs' Agreements are referenced in the attached affidavits.

8. When the parties are unable to agree on how to implement a change in the law, they are directed to pursue dispute resolution. The specific dispute resolution terms of each of the Joint CLECs' Agreements are referenced in the attached affidavits.

9. In August 2003, the FCC released its Triennial Review Order ("*TRO*"), which found impairment nationally with regard to mass markets local switching, but requested a granular review by state public service commissions of the conditions for competitive local exchange service in geographic markets in each state. These rulings were vacated and remanded by *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") on March 2, 2004. The D.C. Circuit's mandate initially was scheduled to issue on May 1, 2004, but the court later granted an extension to June 15, 2004. During the time before the mandate issued, great uncertainty arose as to whether SBC Indiana would continue to process UNE-P orders.

10. The FCC issued the *TRRO* on February 4, 2005. The FCC determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to Section 251(c)(3) of the Federal Act, but did not prohibit CLECs from continuing to obtain unbundled local switching at "just and reasonable" rates pursuant to Section 271 of the Federal Act. The FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within twelve months of the effective date of

the *TRRO*. (*TRRO* § 227.) The FCC determined that the price for Section 251(c)(3) unbundled local switching during the transition period would be the higher of (i) the CLEC's UNE-P rate as of June 15, 2004 plus one dollar, or (ii) the rate established by a state commission between June 16, 2004 and the effective date of the *TRRO* plus one dollar. (*TRRO* § 228.)

11. With respect to new UNE-P orders after the effective date of the *TRRO*, the FCC stated: "The transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." (*TRRO* § 227.)

12. The *TRRO* does not purport to abrogate the change of law provisions of carriers' interconnection agreements. To the contrary, the *TRRO* directs carriers to implement its rulings by negotiating changes to their interconnection agreements:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted.)

13. SBC Indiana issued an Accessible Letter on February 10, 2005 announcing its unilateral intention to withdraw its wholesale tariffs effective March 13,

2005 (SBC Accessible Letter CLECAM05-037).<sup>2</sup> The next day, on February 11, 2005, SBC Indiana issued several Accessible Letters in which it notified CLECs that the *TRRO* had been released, and that SBC was taking further unilateral action as a result (SBC Accessible Letters CLECALL05-016, -017, -018, -019 and -020). Among other things, SBC Indiana stated that "...as of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New (including new lines being added to exiting Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P. Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P on or after the effective date of the TRO Remand Order will be rejected." (*See* Accessible Letter CLECALL05-018). True and correct copies of the February 10 and 11, 2005 SBC Accessible Letters are attached hereto as **Exhibit 8**.

14. As is set out more fully in **Exhibit 1**, in an attempt to clarify SBC Indiana's intent, on February 22, 2005 Acme Communications contacted its SBC Account Manager and was advised that SBC Indiana intended to reject its UNE-P orders if Acme did not sign a "commercial agreement" with SBC Indiana by March 11, 2005.

15. The Commission is already aware of, and may take administrative notice of, MCI's February 15, 2005 objection to SBC's announced tariff withdrawal, which was filed with the Commission on that date. Further, as is set out more fully in **Exhibit 4**, MCI wrote to SBC on February 18, 2005 to indicate that it considered the Feb. 11<sup>th</sup>

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<sup>2</sup> Perhaps recognizing that this Accessible Letter did not constitute proper notice under the terms of the Agreements, SBC Indiana then issued notice letters to this same effect over a week later, on February 18, 2005. The notices to MCI are attached as Exhibit 1 to the Affidavit of Kathy Jespersen filed in support of this motion (Exhibit 4 hereto).

Accessible Letters to be an anticipatory breach of MCI's interconnection agreement with SBC, as well as a violation of the notice, change of law, and dispute resolution terms thereof. That letter demanded adequate assurance from SBC by February 25<sup>th</sup> that SBC would continue to perform under the terms of the MCI/SBC ICA despite the statements in the February 11<sup>th</sup> Accessible Letters, but also stated that MCI may file pleadings seeking emergency relief from SBC's anticipatory breach prior to February 25<sup>th</sup>.

16. Because of objectionable language in SBC's proposed "Interim 'UNE-P Replacement' Commercial Offering" (*see* CLECALL05-016, part of Exhibit 7), none of the Joint CLECs have executed the SBC-proffered commercial agreement to date. For example, SBC's proposed "Interim 'UNE-P Replacement' Commercial Offering" would require CLECs to begin paying the SBC-proposed "UNE-P Replacement" rate of \$23.50, plus usage charges, *immediately* on March 11, 2005 *even for their embedded customer base*. This rate is far in excess of the current Indiana weighted average UNE-P rate of \$16.20<sup>3</sup> (which includes flat-rated switching and therefore *no* usage charges) plus the \$1 add-on set forth in the *TRRO* as the proper UNE-P rate for Joint CLECs' embedded base during the 12-month transition period beginning March 11<sup>th</sup>. Furthermore, SBC Indiana's proposed "UNE-P Replacement" rate would jump to \$25 after just three months (beginning June 11, 2005), and would stay at that exorbitant level for the remainder of the commercial agreement. (*See* CLECALL05-016, part of Exhibit 7). Thus, SBC Indiana is demanding that Joint CLECs pay from \$6.30 (for three months) to \$7.80 (for the remainder of the agreement) *above the FCC-ordered transitional UNE-P rate* – and then pay usage charges on top of these amounts – in exchange for gaining continued

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<sup>3</sup> *See* Anna-Maria Kovacs and Kristin L. Burns, Telecom Regulatory Note, Regulatory Source Associates LLC (August 16, 2004), Table 4A.

access to UNE-P after March 11, 2006. It should not be difficult for the Commission to understand why Joint CLECs have not accepted SBC Indiana's proposed commercial offering "as-is."

17. However, each of the Joint CLECs has advised SBC Indiana that it is willing to engage in negotiations to arrive at a commercial agreement. For example, if SBC Indiana were not trying to force such an excessive "UNE-P Replacement" rate for Joint CLECs' *embedded* customer base for the 12-month transition period from March 11, 2005 through March 11, 2006 – one that so far exceeds the transitional UNE-P rate set forth in the *TRRO* – as a condition of Joint CLECs' continued access to unbundled local switching thereafter, Joint CLECs believe that they could perhaps reach some agreement with SBC Indiana.

18. As is more fully explained in the attached affidavits, the Joint CLECs believe that SBC's refusal to accept new orders will prevent CLECs from obtaining new customers, and SBC's refusal to accept moves, adds, and changes for orders submitted on behalf of CLECs' existing, embedded customer base will result in inadequate service for those existing customers. For example, if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request.

### **SBC INDIANA'S REFUSAL TO ACCEPT AND PROCESS ORDERS**

19. The Agreements require SBC Indiana to provide UNE-P to the Joint CLECs at the rates specified in the respective Agreements. Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC Indiana must continue to accept and provision the Joint CLECs' UNE-P orders at the specified rates. By stating that it will not accept UNE-P orders beginning March 11, 2005, SBC Indiana has anticipatorily breached the Agreements.

20. The *TRRO* does not excuse or justify SBC Indiana's stated intention of refusing to accept the Joint CLECs' UNE-P orders beginning March 11, 2005, because the *TRRO* explicitly requires that its rulings be implemented through changes to parties' interconnection agreements. Implementing the change of law with respect to new UNE-P orders will not be an academic exercise because the parties will need to address, among other issues, SBC Indiana's duty to continue to provide UNE-P to the Joint CLECs at current rates under state law and/or under Section 271 of the Federal Act, and under the SBC/Ameritech merger conditions.

### **SBC INDIANA'S REFUSAL TO FOLLOW THE CHANGE OF LAW PROCESS**

21. The Agreements do not permit parties to implement changes in law unilaterally. To the contrary, the Agreements require that a party wishing to implement a change in law take specified steps, including (i) ensuring that the governmental action in question has taken effect; (ii) providing notice of the change of law to the other party; (iii) undertaking negotiations for the specified period; and (iv) if necessary, pursuing dispute resolution. **See Exhibits 1-7.** By stating its intention to ignore the change of law

provision in the parties' Agreements and take unilateral action to modify those Agreements, SBC Indiana has anticipatorily breached the Agreements.

22. The *TRRO* does not excuse or justify SBC Indiana's failure to comply with the change of law provisions of the Agreements. Section 227 of the *TRRO* states that the twelve month transition period "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order.*" (Emphasis added.) The *TRRO* requires that parties "implement the Commission's findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." (*TRRO* § 233.) The *TRRO* does not exclude its provisions relating to new UNE-P orders from this requirement, nor does it preclude the continued processing of new UNE-P orders by CLECs purchasing unbundled local switching at "just and reasonable" rates under Section 271 of the Federal Act. Although some interconnection agreements may permit SBC Indiana to implement changes in law immediately, the Agreements between SBC Indiana and the Joint CLECs do not. Under the *TRRO* and the Agreements, therefore, SBC Indiana must undertake the change of law process to implement the changes specified in the *TRRO* with respect to (among other issues) new UNE-P orders.

23. Foremost among the difficult issues that the parties must resolve through negotiation and arbitration are (i) whether SBC Indiana can use the *TRRO* to evade its independent UNE unbundling obligations and rates under Indiana state law; (ii) whether SBC Indiana can use the *TRRO* to evade its independent UNE unbundling obligations and associated rates under Section 271 of the Federal Act; and (iii) whether SBC Indiana can use the *TRRO* to evade its independent UNE unbundling obligations under the

SBC/Ameritech merger conditions. It was precisely because parties and state commissions must resolve these and other issues that the FCC mandated that the terms of the *TRRO* be implemented through changes to the parties' interconnection agreements. And, as shown below, they also serve as independent grounds for continuing to enforce the Agreement as written and approved.

24. This Commission specifically found in its January 21, 2005 Docket Entry in this very Cause ("Entry") that to amend a carrier's interconnection agreement, "...the Commission must first examine the provisions, if any, of the individual interconnection agreements as to their provisions for effecting change of law amendments and dispute resolution. If an interconnection agreement contains such provisions, then the terms of the agreement should control the process to effect an amendment." (Entry at 7). In the same Entry, the Commission went on to find that "specific negotiation and dispute resolution provisions of individual interconnection agreements are controlling with respect to change of law amendments and that generic Commission orders cannot be used to circumvent the federal process applicable to individual interconnection agreements." (*Id.* at 8). Under Commission precedent in this very proceeding, then, SBC Indiana's planned unilateral conduct is illegal and improper and should be prohibited.

A. SBC Indiana's Duty to Provide UNE-P Under State Law

25. This Commission recognized in its February 17, 2003 Order in Cause No. 40611-S1 that the Indiana Commission is vested by state law with authority to require the provision of unbundled network elements and to prescribe reasonable conditions for the interconnection of networks. In that order, the Commission found:

Prior to the passage of the federal Telecommunications Act of 1996 ("TA 96" or "the Act"), the Indiana legislature took the initiative to introduce

competition to the telecommunications market. *See* Ind. Code 8-1-2.6 *et seq.* In 1988, “The Indiana general assembly [] declare[d] that:... an environment in which Indiana consumers w[ould] have available the widest array of state-of-the-art telephone services at the most economic and reasonable cost possible w[ould] necessitate full and fair competition in the delivery of certain telephone services throughout the state.” Ind. Code § 8-1-2.6-1. Further, Indiana Code § 8-1-2-5 authorizes the Commission to prescribe reasonable conditions and compensation for physical connections between public utilities engaged in the provision of telecommunications services in Indiana. Finally, the legislature charged the Commission with performing all those duties imposed on it by law (both state and federal). Ind. Code § 8-1-1-3.

\* \* \*

... As we noted in our March 28, 2002 Order in this proceeding, this Cause was instituted as a result of requests that the Commission set prices for services that Ameritech Indiana must provide, including rates for interconnection, unbundled elements, transport and termination, and resale. This Commission is empowered by Ind. Code § 8-1-2-5 to prescribe “reasonable conditions and compensations” for physical connections between two public utilities engaged in the conveyance of telephone messages in Indiana. Further, Ind. Code § 8-1-2-5(b) specifically authorizes the Commission to “determine how and within what time such connection or connections shall be made, and by whom the expense of making and maintaining such connection or connections shall be paid.”

\* \* \*

Similar to the action taken by the Indiana legislature, Congress also passed legislation on the subject of telecommunication competition and interconnection in the Telecommunications Act of 1996. Section 252(d) of that Act specifically authorizes each state utility commission to determine the just and reasonable rates for interconnection services, network elements, transport and termination of traffic in accordance with the standards set forth in the Act. Sections 251 and 252 of the Act gives the Commission broad authority to determine which network elements the incumbent local exchange carriers (“ILECs”) must unbundle; to establish relevant terms, conditions, rates and charges; and to approve or reject interconnection agreements. Specifically, Section 251(d)(3) gives state commissions authority to prescribe and enforce regulations, orders or policies to implement the requirements of the Act, so long as they are consistent with the requirements of Section 251. Further, Section 261(b) provides that a state commission is not precluded from prescribing regulations so long as those regulations are not inconsistent with the Act.

Section 261(c) provides that a state is not precluded from “imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access,” as long as the state’s requirements are not inconsistent with the Act or the FCC’s regulations implementing the Act. Thus, Congress intended that the state commissions have the ability to take those actions necessary and proper to encourage the development of local competition in their respective states. The Commission has jurisdiction over Ameritech Indiana, as it is a public utility and telecommunications service provider under the laws of the State of Indiana. In addition, this Commission has jurisdiction over the subject matter of this Cause, as it is an issue of interconnection and rates of a utility. Sections 252(e)(3) and 261 of the Act preserve the authority of this Commission under State law, and we are conducting this proceeding as a generic Commission investigation pursuant to our authority in Ind. Code §§ 8-1-2-58, -59, -69, 8-1-2.6, and other related statutes. The Commission also finds that its action is consistent with the intent of the Act and an exercise of authority delegated to, and a duty imposed on, the states under the Act.

26. Even if SBC Indiana were empowered by the *TRRO* unilaterally to change the Joint CLECs’ UNE-P rights that arise out of section 251(c)(3) (which it was not), SBC Indiana would not be entitled to change the unbundling and UNE rate sections of the Agreements unilaterally because the Indiana Code and orders of this Commission based upon state law independently support the Joint CLECs’ right to obtain UNE-P from SBC Indiana at the just and reasonable rates set forth in the Agreements.

27. Under I.C. 8-1-2-5, “Every public utility for the conveyance of telephone messages shall permit a physical connection or connections to be made, and telephone service to be furnished, before any telephone system operated by it . . . or between its telephone system and the telephone system of another such public utility, whenever public convenience and necessity require such physical connection or connections and such physical connection or connections will not

result in irreparable injury to the owner or other users of the facilities of such public utilities, nor in any substantial detriment to the service to be rendered by such public utilities. . . . The term 'physical connection,' as used in this section, shall mean such number of trunk lines or complete wire circuits and connections as may be required to furnish reasonably adequate telephone service between such public utilities." Under I.C. 8-1-25(b), the Commission may investigate when the parties fail to agree on the conditions for use of facilities, and may prescribe reasonable conditions and compensation therefor. Thus, the rates and procedures governing UNEs that have been incorporated into the Agreements are independently supported by the Indiana Code, and the Commission necessarily has found those rates and procedures are "just and reasonable." Until this Commission changes the UNE rates and procedures it deems to be just and reasonable, in this or some other docket, the rates and procedures governing UNEs in the Agreement remain in full force and effect.

28. This Commission's authority to require SBC Indiana to unbundle its network at just and reasonable rates has not been preempted by federal law. Preemption occurs when (i) Congress "occupies the field" in the area the state seeks to regulate; (ii) the federal government expressly preempts state regulation; or (iii) there is a conflict between state and federal law. *Dow Chem.. Co. v. Ebling*, 753 N.E.2d 633, 637-8 (Ind. 2001). None of these conditions has occurred.

29. In the *TRO*, the FCC recognized that provisions in the Federal Act preserving state authority demonstrate that Congress did not intend to occupy the field with respect to unbundling. For example, the FCC ruled: "We do not agree with

incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.” (*TRO* ¶ 192, footnotes omitted.)

30. None of the pronouncements of the FCC in the *TRRO* or the *TRO* demonstrate that agency’s intent to preempt the Indiana Code’s authorization of state unbundling, or the Commission’s orders implementing unbundling under Indiana law. Although the *TRO* contained what the D.C. Circuit dubbed the FCC’s “general prediction” about when state agency actions regarding unbundling might be preempted, the *USTA II* court held that the “general prediction voiced in ¶ 195 does not constitute final agency action, as the [FCC] *has not taken any view on any attempted state unbundling order.*” *USTA II*, 359 F.3d at 594 (emphasis added). The court therefore found claims of preemption based on the *TRO* “unripe,” and upheld the FCC’s actions against such claims. *Id.* In the *TRRO*, the FCC addressed “those issues that were remanded to us” by *USTA II*. (*TRRO* ¶ 19.) Because the D.C. Circuit in *USTA II* found no preemption had been attempted in the *TRO*, preemption was not one of the issues remanded to the FCC for consideration in the *TRRO*. Furthermore, despite numerous Bell Operating Company filings with the FCC requesting that the FCC include in the *TRRO* language preempting state law, the *TRRO* contained no such language, thereby implicitly rejecting any claims of state law preemption.

31. The Indiana statute and the Commission’s Orders entered pursuant to I.C. 8-1-2-5 do not conflict with federal law. Under the Federal Act, SBC Indiana is still required to provide access to unbundled local switching under Section 271, so this Commission’s requirement that SBC Indiana unbundle local switching plainly is

consistent with federal law. Moreover, the FCC has held that Section 271 checklist elements must be provided at “just and reasonable” rates, the same pricing standard that this Commission employs in establishing telephone rates in Indiana. *See I.C. 8-1-2-4, 8-1-2-5*. This Commission’s pricing standard therefore does not conflict with federal law.

32. The FCC has increased Section 251(c)(3) unbundled switching pricing during the transition period above the state rates established by the Commission in the Indiana UNE Cost Orders in IURC Cause Nos. 40611 and 40611-S1. This difference does not result in a conflict between federal and state law. In any case, however, the proper way to resolve any dispute concerning this point is not self-help on SBC Indiana’s part, but rather by working through the change of law process in the Agreements. Until that process has been completed, SBC Indiana should not be allowed to change the rates ordered by the Commission and incorporate them into the Agreements.

B. SBC Indiana’s Duty to Provide UNE-P Under Section 271 of the Federal Act

33. Even if SBC Indiana were empowered by the *TRRO* unilaterally to change the Joint CLECs’ UNE-P rights that arise out of section 251(c)(3) (which it was not), SBC Indiana would not be entitled to change the unbundling and UNE rate sections of the Agreements unilaterally because Section 271 of the Federal Act independently supports the Joint CLECs’ right to obtain UNE-P from SBC Indiana at the just and reasonable rates set forth in the Agreements. As discussed below, Joint CLECs believe the “just and reasonable” rates already determined by the Commission are appropriate for Section 271 purposes. However, if SBC is correct that a “just and reasonable” UNE-P rate under Section 271 differs from and is higher than the “just and reasonable” UNE-P rate ordered by the Commission, that rate surely could not be as high as SBC Indiana’s

extortionist “commercial offering” rate. The question of just what “just and reasonable” rate should apply under Section 271 pricing is one that Joint CLECs are more than willing to negotiate with SBC Indiana.

34. As the FCC affirmed in the *TRO*, so long as SBC Indiana wishes to continue to provide in-region interLATA services under section 271 of the 1996 Act, it “must continue to comply with any conditions required for [§271] approval” (*TRO* § 665), and that is so whether or not a particular network element must be made available under Section 251. One of the central requirements of Section 271 is that a Bell Operating Company enter into “binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities.” (Federal Act, § 271(c)(1)(A).) Those agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist. (*Id.* §271(c)(2)(A)(ii).) That checklist requires that the agreement must provide for local switching. (*Id.* § 271(C)(2)(B)(vi).) To satisfy the requirements of the checklist the interconnection agreement must provide switching at a rate deemed just and reasonable. (*Id.*; *TRO*, ¶¶ 662-664.).

35. There is thus a tangible basis for negotiation and dispute resolution regarding SBC Indiana’s continuing obligation to provide Section 271 local switching as part of the UNE-P combination. Although the FCC in the *TRO* declined to require SBC Indiana to combine Section 271 local switching with other UNEs pursuant to section 251(c)(3) (*see TRO* ¶ 655 & n.1989), and that decision was upheld in *USTA II*, the D.C. Circuit noted that the general nondiscrimination requirement of section 202 could provide

an independent basis for requiring the combination of Section 271 switching with other UNEs. *USTA II*, 359 F.3d at 590. This is but one issue for negotiation and dispute resolution.

36. Providing unbundled mass market switching in isolation provides nothing of value to CLECs because SBC Indiana owns the loop plant that serves consumers in its service territory. If SBC Indiana were to provide unbundled switching to CLECs in isolation, while providing switching to its retail business combined with all the other elements needed to provide service, SBC Indiana would discriminate against CLECs in violation of Section 202 of the Federal Act. Thus, there is plainly a dispute between SBC Indiana and the CLECs regarding SBC Indiana's obligation to provide Section 271 switching in combination with the other elements that make up UNE-P. As noted above, this Commission has necessarily determined that the UNE rates in the Agreements are "just and reasonable" under Indiana law. The Joint CLECs submit, therefore, that until this Commission or the FCC reaches some other conclusion, the rates in the Agreement should be determined to be "just and reasonable" under section 271. If SBC disagrees, its remedy is not to unilaterally cease provisioning UNE-P effective March 11, 2005, but to initiate proper change of law and dispute resolution processes with each of the Joint CLECs to address its concerns.

C. SBC Indiana's Duty to Provide UNE-P Under the SBC/Ameritech Merger Conditions

34. SBC has an independent legal obligation pursuant to the *SBC/Ameritech Merger Conditions* to continue to make UNEs, including unbundled switching, available under the *UNE Remand Order* until the date on which the FCC orders in that proceeding,

and any subsequent proceedings, become final and non-appealable.<sup>4</sup> The purpose of this condition was to provide stability to competitive markets during periods of uncertainty when the FCC's regulations implementing Section 251(c)(3) of the Act had been stayed or vacated.<sup>5</sup> In the *SBC/Ameritech Merger Order* the FCC explained:

In order to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding, *from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, become final and non-appealable*, SBC and Ameritech will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements, unless the Commission removes an element from the list in the UNE Remand proceeding or a final and non-appealable judicial decision that determines that SBC/Ameritech is not required to provide the UNE in all or a portion of its operating territory.<sup>6</sup>

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<sup>4</sup> *Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket 98-141, Memorandum Opinion and Order, FCC 99-279, Appendix C ¶ 53 (1999) ("*SBC/Ameritech Merger Order*").

The relevant condition in the *SBC/Ameritech Merger Order* provides as follows:

SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combinations of UNEs were made available on January 24, 1999, until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.

*Id.* (footnotes omitted).

<sup>5</sup> See *id.* at ¶ 316 (emphasizing the intent to provide certainty to CLECs to counter uncertainty posed by litigation over ILEC unbundling obligations).

<sup>6</sup> *SBC/Ameritech Merger Order*, ¶ 394 (emphasis added).

These conditions remain in effect, because the successor proceeding to the *UNE Remand* proceeding – the *Triennial Review* – remains appealable. The *UNE Remand* Order was appealed to the D.C. Circuit, and that court remanded the decision to the FCC in its first *USTA* decision.<sup>7</sup> The FCC then consolidated the *UNE Remand* into the *Triennial Review*.<sup>8</sup> Later, the appeals of the *TRO* were transferred to the same panel at the D.C. Circuit because the order arose from the same proceeding.<sup>9</sup> Thus, as long as the *Triennial Review* proceeding remains pending before the FCC, the *UNE Remand* proceeding has not been terminated by a final, non-appealable order.

### **PRAYER FOR RELIEF**

WHEREFORE, for the foregoing reasons, the Joint CLECs respectfully request that the Commission:

- (1) Order SBC Indiana to continue accepting and processing the Joint CLECs' UNE-P orders, including new orders, moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of the Agreements;
- (2) Order SBC Indiana to comply with the change of law provisions of the Agreements with regard to the implementation of the *TRRO*;
- (3) Order such further relief as the Commission deems just and appropriate.

Dated this 25<sup>th</sup> day of February, 2005.

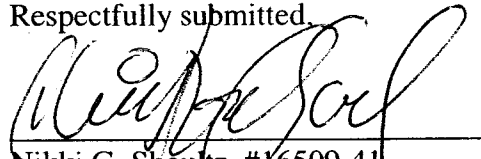
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<sup>7</sup> *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

<sup>8</sup> The *TRO* is expressly captioned as an "Order on Remand" in the *UNE Remand* docket (CC Docket No. 96-98).

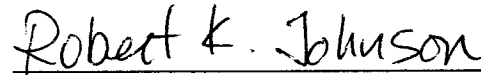
<sup>9</sup> *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8<sup>th</sup> Cir. 2003); *USTA II*, slip op. at 10-11.

Respectfully submitted,



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